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No. _____

In the Supreme Court of the United States

BRETT ALDEN BETHURUM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is the issue of whether a defendant charged under 18 U.S.C. §922(g) has knowingly and intelligently waived the right to counsel and the right to a jury trial a question of law to be resolved by the judge or an element of the offense to be determined by the jury?

II. Is a waiver of the right to counsel and the right to a jury trial in a misdemeanor domestic violence offense knowing and intelligent if the defendant is not counseled that he is thereafter prohibited from possessing a firearm or is the firearm prohibition a collateral consequence of the plea that has no bearing on the constitutional validity of the plea?

III. Did the Court of Appeals improperly place the burden of proof on Petitioner to show that his waiver of counsel and a jury trial in the state domestic violence case was knowing and intelligent?

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Petitioner Brett Alden Bethurum hereby petitions for writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit vacating the District Court's order granting a judgment of acquittal pursuant to Rule 29 (a) of the Federal Rules of Criminal Procedure.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, dated August 20, 2003 is: United States of America v. Brett Alden Bethurum, number 02-10962. This opinion can be found at 343 F.3d 712 (5th Cir. 2003). A copy of this opinion may be found in Appendix A of this Petition.

The opinion of the District Court in this case may be found at *United States v. Bethurum*, 213 F.Supp.2d 679 (N.D.Tex. 2002). This opinion is found in Appendix C of this Petition.

STATEMENT OF JURISDICTION

The District Court granted a post verdict Motion for Judgment of Acquittal pursuant to Rule 29, F. R. Crim. Proc. on July 31, 2002. On August 20, 2003, the United States Court of Appeals for the Fifth Circuit reversed the District Court. On September 16, 2003, the Petition for Rehearing was denied. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

LEGAL AUTHORITY

United States Constitution, Amendment II, United States Constitution, Amendment V, United States Constitution, Amendment VI, 18 U.S.C. §922(g)(9), 18 U.S.C.

§921(a)(33)(B)(i). (Full text on all legal authority found in Appendix D).

STATEMENT OF THE CASE

On June 9, 1997, Petitioner Brett Alden Bethurum plead guilty to misdemeanor attempted assault with bodily injury for kicking his wife. The Petitioner signed a "Waiver of Appointment of Attorney and Waiver of Jury Trial by Defendant Entering Plea of Guilty." The court deferred adjudication for twenty-four months and placed the Petitioner on probation. Petitioner violated the terms of his probation, his probation was revoked and he was adjudicated guilty of misdemeanor assault against his wife.

In April, 2002, Petitioner was indicted on eight counts of possessing a firearm in and affecting interstate commerce in violation of 18 U.S.C. §922(g)(9) (2000). That statutory section makes it "unlawful for any person who has been convicted in any court of a misdemeanor crime of domestic violence to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. §922(g)(9). Notwithstanding this prohibition, no person shall be considered to have been convicted of a misdemeanor crime of domestic violence unless "the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case . . ." *and* either had the case tried by a jury or knowingly and intelligently waived that right. 18 U.S.C. §921(a)(33)(B)(i)(I) and (II).

Prior to trial, Petitioner moved to dismiss the indictment on the grounds that he had not been "convicted" of a misdemeanor crime of domestic violence because he had pleaded guilty to that offense without knowingly and

intelligently waiving his right to counsel or his right to a jury trial. The district court denied the motion but ruled that the validity of Petitioner's waivers was an element of the offense that the government had to prove to the jury at trial. At trial, Petitioner stipulated to all elements of the offense except the question of whether he had knowingly and intelligently waived his right to counsel and to a jury trial. The government introduced a copy of the "Waiver of Appointment of Attorney and Waiver of Jury Trial by Defendant Entering Plea of Guilty" referenced above. In addition, the government introduced testimony by the presiding judge who did not recollect Petitioner's case but testified as to his normal procedures for *pro se* defendants. The judge testified that he doubted that he advised Petitioner that a domestic violence conviction could impact his right to possess a firearm. The government also introduced the testimony of a former assistant district attorney assigned to the judge's court who corroborated the judge's testimony regarding his routine waiver procedures.

At the close of the government's case, Petitioner moved for a judgment of acquittal under Rule 29(a) of the Federal Rules of Criminal Procedure. The court reserved ruling on the motion and the Petitioner testified on his own behalf. At the close of all evidence, Petitioner renewed his motion for judgment of acquittal which was again denied. After the jury returned a guilty verdict, Petitioner moved for judgment of acquittal under Rule 29(c) of the Federal Rules of Criminal Procedure. The District Court granted the motion, set aside the jury verdict and entered a judgment of acquittal on all eight counts.

The government appealed the district court's order granting the judgment of acquittal pursuant to 18 U.S.C. §3731 and the Fifth Circuit Court of Appeals reversed. The

Fifth Circuit held that the validity of a defendant's waivers of the right to counsel and right to a jury trial is a matter of law for the court's pretrial determination. The Fifth Circuit then determined that Petitioner knowingly and intelligently waived his right to counsel and trial by jury at the time of his domestic violence misdemeanor conviction. In addition, the Fifth Circuit held that the ability to possess a firearm is a "collateral matter" and that the failure to warn a defendant of the loss of that right does not establish that his guilty plea was not entered knowingly and intelligently. The Fifth Circuit vacated the district court's order granting Petitioner's motion for judgment of acquittal and reinstated the jury verdicts of guilty on all eight counts.

REASONS FOR GRANTING THE WRIT

Question I

Is the issue of whether a defendant charged under 18 U.S.C. §922(g) has knowingly and intelligently waived his right to counsel and the right to a jury trial a question of law to be resolved by the judge or an element of the offense to be determined by a jury?

Reasons for Granting the Writ on Question I

The opinion of the Court of Appeals for the Fifth Circuit in this case addresses an important question of federal law and is contrary to this Court's holding in *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). See Rule 10(c), Supreme Court Rules. In *Gaudin*, the Supreme Court reiterated the oft-repeated tenet that the Due Process Clause of the Fifth Amendment to the United States Constitution and the Sixth Amendment right to a jury trial require that a criminal conviction rest upon a jury

determination that the defendant is guilty of every element of the crime with which he is charged beyond a reasonable doubt. *See, Sullivan v. Louisiana*, 508 U.S. 275, 277-78, 113 S.Ct. 2078, 2080-81, 124 L.Ed.2d 182 (1993). In contravention of this basic principle, without even mentioning *Gaudin*, the Fifth Circuit in the case at bar found the question of whether the defendant validly waived his right to counsel and right to a jury trial in the underlying state conviction to be questions of law for the Court over which the jury, as trier of fact, has no say.

The question in *Gaudin* was whether materiality of a false statement in a prosecution of 18 U.S.C. §1001 was a question of law for the Court or a question for the jury in assessing guilt or innocence. In rejecting the government's contention that materiality was a question for the Court, the Supreme Court first noted that materiality was an element of the offense. The Court then explained that the application of legal standards, such as definitions of a term like materiality, to a factual standard, is the type of issue that is to be resolved by a jury. This concept is often referred to as a "mixed question of law and fact" and, according to the Court in *Gaudin*, such questions are for the jury as the trier of fact.

The Fifth Circuit, in the case at bar, recognized that this was a question of first impression in the Circuit but stated "those courts which have considered the question have unanimously concluded that the requirements of §921(a)(33)(B)(i) are part of the legal definition of a "misdemeanor crime of domestic violence" to be decided by the court as a matter of law rather than a separate and essential element of a violation of §922(g)(9) which must be proven to the jury beyond a reasonable doubt." While it is true that the Fifth Circuit is not the only court to make this

finding, it is incorrect to characterize this as an unassailable proposition.

First, the District Court in this case came to the opposite conclusion as the Fifth Circuit. Moreover, in *United States v. Akins*, 243 F.3d 1199 (9th Cir. 2001), amended, 276 F.3d 1141 (9th Cir. 2002), relied on by the Fifth Circuit in its opinion, the Ninth Circuit initially stated,

> "Congress made knowing and intelligent waiver an element of the §922(g)(9) offense. The government thus has the burden of proving beyond a reasonable doubt a knowing and intelligent waiver of the right to counsel in the predicate offense."

In the amended opinion, the Ninth Circuit replaced this language with the following:

> "Because §921(a)(33)(B)(i)(1) is a legal definition, its application presents a question of law to be decided by the trial judge."

While the *Akins* court did not explain its change of heart, it is important to note that the court there found the waiver of counsel in that case to be invalid and reversed the conviction. Therefore, the question of whether this was an issue for the judge or jury was not essential to a determination of that case and the Ninth Circuit's discussion is best characterized as *dicta*.

The Fifth Circuit also cited *United States v. Hartsock*, 253 F.Supp.2d 24 (D.Me. 2003). This opinion was reversed in *United States v. Hartsock*, 347 F.3d 1 (lst Cir. 2003). In the First Circuit opinion, the court made the following

observations concerning the question of whether the waiver issues are for the judge or jury:

> "On appeal, Hartsock and the United States agree that whether Hartsock knowingly and intelligently waived his right to counsel is a question of law to be resolved by the judge in a Rule 104(a) hearing. We take no position on the proper resolution of this issue other than to rule that Hartsock has waived any argument that he is entitled to submit this issue to a jury by having adopted the stance that it is a preliminary question for the court."

The *Hartsock* court went on to state:

> "We think the question is not trivial. Determining whether there was a waiver of counsel or whether any waiver was knowing and intelligent will in the absence of documentation, turn on the testimony of witnesses whose credibility will be at stake. Other exceptions, by contrast, may turn on easily provable objective facts. . ."

Based on these comments in *Hartsock*, it is far from certain that the First Circuit would agree with the resolution of this issue by the Fifth Circuit in the case at bar.

In two of the cases upon which the Fifth Circuit relied, *United States v. Smith*, 171 F.3d 617, 621-22 (8th Cir. 1999) and *United States v. Pfeifer*, 206 F.Supp.2d 1002, 1007-08 (D.S.D. 2002) the courts ruled on the waiver issues as questions of law without any elaboration or analysis. Apparently, whether these questions could be jury issues was not contested in those cases. In *United States v. Thomson*, 134 F.Supp.2d 1227 (D. Utah 2001), the Court found the

waiver issue to be a question for the court, but, as in the Fifth Circuit opinion in the case at bar, made no mention of *Gaudin* or its application to the question.

A close review of this case law will demonstrate that this is an issue about which reasonable judges have disagreed. As the First Circuit said in *Hartsock*, it is not a trivial question and it is an issue the resolution of which must ultimately be made by the Supreme Court.

The Fifth Circuit further relied on cases interpreting questions raised under other firearms offense provisions under Title 18 as "purely legal questions." However, as the First Circuit noted in *Hartsock*, *supra*, these other situations turn on easily provable objective facts whereas the question of a valid waiver of counsel and a jury trial will, in the absence of documentation, "turn on the testimony of witnesses whose credibility will be at stake." This, of course, is precisely the distinction between the cases cited by the Fifth Circuit and the case at bar. For instance, *Beecham v. United States*, 511 U.S. 368, 370-71, 114 S.Ct. 1669, 128 L.Ed.2d 383 (1994) involved a question of whether state or federal law applied to determine when a person's civil rights had been restored. This is clearly a pure legal question.

In *United States v. Daugherty*, 264 F.3d 513 (5th Cir. 2001), the court found that whether a felony conviction may serve as a predicate offense for prosecution for being a felon in possession of a firearm is purely a legal question. The question addressed in *Daugherty* simply involved a determination of whether the offense for which the defendant stood convicted was a "crime punishable by imprisonment for a term exceeding one year." Such a determination is a legal one since it involves an objective review of the law of the jurisdiction from which the underlying conviction arose. The

second question in *Daugherty* involved a determination of whether a defendant's civil rights have been restored. This requires a determination of the manner and circumstances under which state law allows restoration of civil rights following a felony conviction. Again, there were no factual questions to be determined in *Daugherty*; rather, it was a simple matter of referring to state law for the answer.

United States v. Bartelho, 71 F.3d 436 (lst Cir. 1995) addressed the question of whether the government or the defendant bore the burden of proving that a defendant's right to bear arms had not been restored. Since resolution of this question required proof of a negative proposition that was much easier for the defendant to prove, the court placed this burden on the defendant.

United States v. Flower, 29 F.3d 530 (10th Cir. 1994) addressed the same issue as *Bartelho*. As discussed below, since this issue and its resolution are dissimilar to the issue in the case at bar this case provides the Fifth Circuit no succor. *United States v. Clark*, 993 F.2d 402 (4th Cir. 1993) dealt with the same issue, but resolved it differently. The *Clark* court said:

> "Moreover, we have held that the government must prove, in establishing a predicate conviction under §922(g), that the defendant's civil rights and right to possess a firearm have not been restored. *United States v. Essick*, 935 F.2d 28 (4th Cir. 1991)."

Clark stated that the lack of restoration of civil rights and the right to possess a firearm is not an element of the offense stated in §922(g), but could be classified as a "component of the definition of the element that the accused have 'been

convicted in any court punishable by imprisonment exceeding one year.'"

An accurate reading of *Clark* demonstrates that the Fourth Circuit approach would not be in concert with the Fifth Circuit's reasoning in the case at bar. Under *Clark* and *Essick*, while the definition of a prior offense is not considered a direct element, it is, nevertheless, a component of an element which the government is required to prove.

The common thread throughout the cases upon which the Fifth Circuit relies is that when questions involve a reference to a law or a simple examination of legal documents, they are questions for the judge. However, the question of whether a defendant validly waived his right to counsel and right to a jury trial requires the trier of fact to listen to testimony and assess the credibility of witnesses and is, therefore, a jury question.

Moreover, the statute at issue in most of the cases the Fifth Circuit relied on, 18 U.S.C. §922(g)(1), requires proof that something happened following the state court convictions, i.e., expungement, set aside of conviction or pardon. This is an area over which the defendant has superior knowledge and the burden of proof on this question may properly be placed on the defendant. Requiring the government to prove a negative fact may be too onerous to reasonably expect of the prosecutor. By contrast, proving a valid waiver of a jury trial and right to counsel does not require proof of a negative fact and concerns matters over which government agents, such as a state trial judge and prosecutor, would have intimate knowledge.

Further explaining its ruling, the Fifth Circuit erroneously concludes that the determination of admissibility of the prior

conviction should be made under F. R. Evid. 104. Rule 104(a) states that preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court. . ." This rule has no applicability to the question in the case at bar. The question here is not one of admissibility; rather it is a question of burden of proof, whether an issue is one for the judge or jury, and whether there is sufficient evidence to prove an offense.

The reasoning of the District Court in the case at bar was basically ignored by the Fifth Circuit. Nevertheless, the District Court set out, with particular persuasiveness, the reasons why the validity of the waivers is an issue for the jury.

The District Court first addressed the government's reliance on *McKelvey v. United States*, 260 U.S. 353, 357, 43 S.Ct. 132, 67 L.Ed. 301 (1922). The District Court pointed out that *McKelvey* involved the question of whether the government must prove a negative exception. The statute at issue in the case at bar is not an exception, but rather, as the District Court stated,

> ". . . it is an affirmative statement of important elements that constitute the §922(g)(9) offense."

The District Court's opinion distinguished between the statute at issue here, §921(a)(33)(B)(i) and §921(a)(33)(B)(ii). The latter provision states in part:

> "(ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set

aside, or is an offense for which the person has been pardoned or has had civil rights restored. . . ."

The District Court found that Section (ii) probably introduced an exception on which the defendant would have the burden of proof. By contrast, §921(a)(33)(B)(i) is a basic part of the definition of the term "misdemeanor crime of domestic violence" and does not create an exception. This section, ". . . is a part of the offense defining portion of the offense statute - it provides a description of factors that must be found to exist before an accused can be subjected to the offense in the first instance."

Significantly, the District Court relied on two cases, neither of which were even mentioned by the Fifth Circuit. The applicability of *United States v. Gaudin*, *supra*, to this case has been fully discussed. The Fifth Circuit also failed to address the District Court's citation to *United States v. Perrien*, 274 F.3d 936, fn. 1 (5th Cir. 2001). This footnote directly refutes the underlying premise of the Fifth Circuit's opinion. The footnote from *Perrien* cited *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), for the proposition that any element included in the offense defining part of a criminal statute must be proven to a jury beyond a reasonable doubt.

Under *Apprendi* the fact that the waiver of counsel and jury trial provisions are contained within the definitional section of the statute has no bearing on whether they are elements the government must prove beyond a reasonable doubt to a jury.

The District Court also addressed the Ninth Circuit's opinion in *Akins*, stating:

> The Ninth Circuit mixes apples with oranges (an expungement exception with a legal definition of the offense) to reach its amazing conclusion that "because §921(a)(33)(B)(i)(1) is a legal definition its application presents a question of law to be decided by the trial judge."

As the District Court stated, the Ninth Circuit got it right the first time when it found that the knowing and intelligent waiver provisions under §921 were elements of the offense which the government was required to prove beyond a reasonable doubt to the trier of fact.

Conclusion

The District Court's decision in this case is better reasoned and more legally accurate than that of the Fifth Circuit. In reversing the District Court, the Fifth Circuit rendered a decision that directly conflicts with this Court's decision in *United States v. Gaudin*. Moreover, this case raises an important and recurring issue of federal law that has not been, but should be settled by the Supreme Court. Therefore, this petition should be granted. See Rule 10(c), Supreme Court Rules.

Question II

Is a waiver of the right to counsel and right to a jury trial in a misdemeanor domestic violence offense knowing and intelligent if the defendant is not counseled that he is thereafter prohibited from possessing a firearm or is the firearm prohibition the type of collateral consequence of the plea that has no bearing on the constitutional validity of the plea?

Reasons for Granting the Writ on Question II

At what point does a "collateral consequence" of a conviction become so onerous that it can no longer be considered collateral? When is a consequence of a conviction that is automatic upon conviction significant enough to require that a defendant be informed of its existence? At what point is a plea and a jury and counsel waiver invalid when the defendant is not informed of a direct, serious and certain consequence of the plea that is more serious than the consequences of which he has been informed? These issues are all squarely before the court in this case and the court now has the opportunity to resolve this highly contentious and important question of federal constitutional law that remains unsettled. *See* Rule 10(c), Supreme Court Rules.

The question is whether the petitioner entered a knowing and intelligent plea or whether he plead without knowledge of all of the relevant circumstances and likely consequences. If his plea was not knowingly and intelligent, the resulting conviction violated due process under the Fifth Amendment and cannot be used as a predicate to prosecution for possession of a firearm following a domestic violence conviction. *See Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

The Fifth Circuit concluded that Petitioner knowingly and intelligently waived his rights to counsel and trial by jury at the time of this misdemeanor domestic violence conviction. In so deciding, the Fifth Circuit relied on State Judge Adcock's routine procedures, which included having the defendant sign the waiver form, explaining the form and

warning the defendant about the advantages of being represented by counsel.[1]

The Court of Appeals concluded that,

> "Bethurum has not demonstrated that, at the time he plead guilty, his waiver of his rights was not knowing and intelligent."[2]

The Fifth Circuit went on to find that Petitioner's plea could be knowing and intelligent without his being warned concerning the effect that a guilty plea would have on his ability to possess a firearm. The court found this prohibition of possession of a firearm to be a "collateral consequence," knowledge of which had no bearing on whether the plea was knowing and intelligent.

Although not addressed by the Fifth Circuit, the District Court stated that in evaluating a waiver, a court should adopt every reasonable presumption against waiver. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938). In fact, the Fifth Circuit presumed the waiver valid, thus violating the *Zerbst* principle.

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[1] The Fifth Circuit also improperly relied on Petitioner's own testimony that Judge Adcock followed these procedures in his case. Since the Judgment of Acquittal motion the District Court granted was the motion on which ruling was reserved at the time the government rested, the proper consideration was only the evidence the government had presented at that time. See F. R. Crim. Proc. 29(a) and (b).

[2] The Court of Appeals has misplaced the burden of proof on this question on Petitioner. This error is discussed under Question III.

The District Court found that a defendant could not knowingly and intelligently waive his right to counsel and right to a jury trial within contemplation of §921(a)(33)(B)(i) without knowing that a consequence of this waiver would be the deprivation of his right to possess a firearm. The District Court recognized this deprivation of firearm rights to be an important and onerous consequence of a guilty plea on a misdemeanor domestic violence case and not a mere collateral consequence.

As noted by the District Court, the Fifth Circuit has previously held that the Second Amendment to the United States Constitution, "protects the rights of individuals, including those not then actually a member of any militia or engaged in an active military service or training, to privately possess their own firearms. . ." *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001); *cert. denied*, 536 U.S. 907, 122 S.Ct. 2362, 153 L.Ed.2d 184 (2002). Under *Emerson*, a guilty plea on a misdemeanor domestic violence offense has a direct and immediate impact on a defendant's Second Amendment right to possess a firearm. This is not a mere triviality. When a plea of guilty on a misdemeanor domestic violence case has the result of automatically extinguishing the valuable and historic right of a person to possess a firearm, the failure to inform the defendant of the loss of this right should not be condoned.

The concept of not requiring that a defendant be informed of so-called "collateral consequences" of a plea has arisen in numerous situations. As the Fifth Circuit said, the fact that a conviction could be used to enhance a sentence at a subsequent trial, that a driver's license could be forfeited, that a person was ineligible for parole, that a defendant would lose his right to vote, lose his right to travel abroad and could be deported have all been found to be collateral consequences of

which a defendant does not need to be aware in order to enter a knowing and intelligent plea. However, none of those consequences involve the immediate and automatic deprivation of a constitutional right such as the right to possess a firearm.

The Fifth Circuit also cited several state court cases stating that the loss of the ability to possess a firearm is a collateral consequence of which defendant need not be informed. All of these cases can readily be distinguished from the case at bar. First, none addressed the fact that a domestic violence conviction results in the immediate deprivation of the valuable constitutional right to possess a firearm under the Second Amendment. Second, all of those opinions predated *United States v. Emerson* and its thorough discussion of the Second Amendments provision allowing private individuals to possess a firearm.

In fact, the loss of the right to possess a firearm is not a "collateral consequence" of a domestic violence conviction. In reality, it is a direct consequence. The loss of the right to possess a firearm after a domestic violence conviction is not dependent on the further action of any other governmental agency. Once the state court enters judgment on the domestic violence conviction, the prohibition on possession of a firearm is immediate and automatic. If, at that very moment, the defendant was in possession of a firearm, he could be arrested and prosecuted in federal court for a violation of 18 U.S.C. §922(g)(9).

A collateral consequence, by contrast, is something that requires further action. *See Moore v. Hinton*, 513 F.2d 781, 782-83 (5th Cir. 1975) ("Alabama Department of Public Safety, not the court, deprives defendant of his drivers license. The Court accepts the plea and sentences the

defendant. The Department of Public Safety then institutes a separate proceeding for suspension of the driver's license"). The same is true of deportation, loss of voting privileges or the use of a conviction to enhance a future sentence. All require further action by some agency other than the sentencing court, such as the Immigration and Naturalization Service, local election authorities, or prosecuting attorneys. Likewise, in all of these situations, requiring advice to a defendant of these "collateral consequences" would require a judge to predict what another governmental agency will do. By contrast, the loss of firearm privileges following a domestic violence conviction is automatic and requires no guess work or predictions by the presiding judge.

Therefore, the basic premise of the Court of Appeals' holding, i.e., that the loss of the right to possess of a firearm is a collateral consequence, is incorrect. It is direct, not collateral, and the defendant must be informed of it in order to enter an intelligent and knowing plea.

Conclusion

Based upon the critical importance of this question, the Supreme Court should grant this Petition.

Question III

Did the Court of Appeals improperly place the burden of proof on Petitioner to show that his waiver of counsel and a jury trial in the state domestic violence case was knowing and intelligent?

Reasons for Granting Writ on Question III

In the Court of Appeals opinion, the court stated:

> ". . . Bethurum has not demonstrated that, at the time he pleaded guilty, his waiver of his rights was not knowing and intelligent."

The Fifth Amendment to the United States Constitution requires that the burden of proof be placed on the government. *See In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Sullivan*, *supra*. The Fifth Circuit's opinion violates that bedrock principle.

Support for the Fifth Circuit's approach is found in *United States v. Hartsock*, 347 F.3d 1 (lst Cir. 2003) (finding §921(a)(33)(B)(i) to constitute an affirmative defense and placing burden on defendant). However, other circuits have come to opposite conclusions. *See United States v. Flower*, 29 F.3d 530 (10th Cir. 1994) ("nothing in the plain language of §922(g)(1) or 921(a)(20) suggests that the §921(a)(20) definition constitutes an affirmative defense"); *United States v. Clark*, 993 F.2d 402 (4th Cir. 1993); *United States v. Essick*, 935 F.2d 28 (4th Cir. 1990) ("Moreover, we have held that the government must prove in establishing a predicate conviction under §922(g) that the defendant's civil rights and right to possess a firearm have not been restored").

The Fifth Circuit did not engage in the type of analysis found in *Hartsock*. However, the only justification for placing the burden of proof on the defendant is to label the provision as an affirmative defense. Even then, it is highly doubtful whether it is proper to place the burden on the defendant.

First, §921(a)(33)(B)(i) is not an affirmative defense. Under *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), if the provision negates an element of the crime it is not an affirmative defense. Here, if there was no knowing and intelligent waiver of the right to counsel or a jury trial there would be no conviction of a misdemeanor crime of domestic violence under §922(g)(9). Therefore, this provision negates an element of the crime. Moreover, this provision has not been designated as an affirmative defense by the legislature. *See United States v. Talbott*, 78 F.3d 1183 (7th Cir. 1996) (absent legislative action burden of proof remains on government).

As discussed in *Hartsock*, even if §921(a)(33)(B)(i) constitutes an affirmative defense, that does not invariably command the conclusion that the defendant carries the burden of persuasion. In fact, in *United States v. Dodd*, 225 F.3d 340 (3d Cir. 2000), the Court noted that there "has been a twentieth century trend towards requiring the government to bear the burden of persuasion on certain affirmative defenses." The Fifth Circuit's opinion is contrary to this trend. Based on the reasons discussed in this Petition under Question I, the burden of persuasion on this issue should be on the government.

Conclusion

The proper allocation of the burden of proof is an issue distinct from that of whether a judge or a jury decides the issue. There is a festering disagreement in the lower courts on this question. Therefore, this highly important question should be addressed by the Supreme Court.

PRAYER FOR RELIEF

This Petition raises important questions concerning the application of the federal statute criminalizing possession of a firearm by a person with a conviction for a misdemeanor crime of domestic violence. Prosecutions under that provision are numerous and many unanswered questions concerning the statutory scheme and the application of various constitutional rights persist. Accordingly, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-10962

[Filed September 16, 2003]

UNITED STATES OF AMERICA,
Plaintiff - Appellant

v.

BRETT ALDEN BETHURUM,
Defendant - Appellee

Appeal from the United States District Court
for the Northern District of Texas, Fort Worth

Before KING, Chief Judge, and HIGGINBOTHAM and BARKSDALE, Circuit Judges.

ON PETITION FOR REHEARING EN BANC

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is

DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/_____
Carolyn Dineen King
United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-10962

[Filed August 20, 2003]

UNITED STATES OF AMERICA,
Plaintiff - Appellant

v.

BRETT ALDEN BETHURUM,
Defendant - Appellee

Appeal from the United States District Court
for the Northern District of Texas
4:02-CR-61-1
John H McBryde, US District Judge

Before KING, Chief Judge, and HIGGINBOTHAM and BARKSDALE, Circuit Judges.

OPINION

KING, Chief Judge:

The United States appeals the district court's order granting Defendant-Appellee Brett Alden Bethurum's motion for judgment of acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure. We vacate the order and remand for reinstatement of the jury verdict finding Bethurum guilty on eight counts of possessing a firearm in and affecting interstate commerce after being convicted of a misdemeanor crime of domestic violence in violation of 18 U.S.C. § 922(g)(9) and 18 U.S.C. § 924(a)(2).

I. FACTS AND PROCEDURAL HISTORY

On June 9, 1997, Defendant-Appellee Brett Alden Bethurum was convicted of misdemeanor attempted assault with bodily injury for kicking Rebecca Bethurum, his wife. At that time, Bethurum chose to enter a plea of guilty to the offense. To that effect, he signed a document entitled "Waiver of Appointment of Attorney and Waiver of Jury Trial by Defendant Entering Plea of Guilty" which states:

> Now comes the undersigned Defendant in this cause and represents to the Court that I have no attorney, that I do not intend to employ counsel herein, and that I waive any right I may have to have the Court appoint an attorney to defend me in this cause.
>
> I acknowledge that I have been advised by the Court of my right to representation by counsel in the trial of the charge pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge. Understanding my

> right to have counsel appointed free of charge if I am not financially able to employ counsel, I wish to waive that right and request the Court to proceed with my case without an attorney being appointed for me. I hereby waive my right to counsel.
>
> I further represent to the Court that I desire to make immediate disposition of this case by here and now entering my plea of guilty, waiving trial by jury and submitting it to the Court on all issues of law and fact.
>
> WHEREFORE, premises considered, Defendant prays the Court to proceed immediately to arraign me in this cause, accept my plea of guilty and waiver of jury trial, to enter judgment thereon and, having entered the same, to immediately sentence me in the manner provided by law, waiving for said purpose every provision of the law the effect of which would delay of [sic] arrest entry of judgment or imposition of sentence.

This document was also signed by the presiding judge, Judge J.R. Adcock, indicating that it was "approved and granted." The state court deferred adjudication for twenty-four months and placed Bethurum on probation. However, he violated the terms of his probation when he was convicted for driving while intoxicated. As a result of the DWI conviction, Bethurum's probation was revoked and he was adjudicated guilty of misdemeanor assault against his wife.

In April 2002, Bethurum was indicted on eight counts of possessing a firearm in and affecting interstate commerce in violation of a federal statute making it "unlawful for any person who has been convicted in any court of a misdemeanor crime of domestic violence to ship or transport in interstate or

foreign commerce, or possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g)(9) (2000). Bethurum pleaded not guilty to all eight counts of the indictment.

Prior to trial, Bethurum moved to dismiss the indictment on the grounds that he had not been convicted of a "misdemeanor crime of domestic violence" because he had pleaded guilty to the alleged predicate offense without "knowingly and intelligently" waiving either his right to counsel or his right to a jury trial. *See* 18 U.S.C. § 921(a)(33)(B)(i):

> A person shall not be considered to have been convicted of [a misdemeanor crime of domestic violence] for purposes of this chapter, unless -
>
> (I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and
>
> (II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either
>
> (aa) the case was tried by jury, or
>
> (bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

Id. After considering Bethurum's motion and the government's response in opposition, the district court ruled that the validity of Bethurum's waivers was an element of the

alleged violation of § 922(g)(9) that the government had to prove to the trier-of-fact at trial.

The case was tried to a jury on June 17, 2002. Prior to trial, the parties stipulated that: (1) Bethurum knowingly possessed the firearms alleged in each count of the indictment; (2) the firearms alleged in each count had traveled across state lines and thereby affected commerce prior to the time of the alleged violation of § 922(g)(9); and (3) Bethurum had been adjudicated guilty in 1999 of the misdemeanor assault charge for kicking his wife. Thus, the only question remaining before the jury was whether Bethurum "knowingly and intelligently" waived his rights to counsel and a jury trial when he pleaded guilty *pro se* to the previous assault charge.

The government at trial introduced into evidence a copy of the waiver form quoted above. The government also called Judge Adcock, who testified that, while he did not specifically recall Bethurum's case, his routine procedures during *pro se* cases included counseling the defendant as to the advantages of an attorney and reviewing the written waiver form with each defendant on an individual basis. Judge Adcock also testified that he routinely would advise the defendant that a conviction in some circumstances could have collateral consequences down the line, such as losing the right to vote. However, Judge Adcock testified that he doubted that he specifically warned Bethurum that conviction on the domestic relations misdemeanor would affect his rights concerning firearms use and possession, remarking that "there's no way that I can go over all of the ramifications of a plea of guilty." A former district attorney assigned to Judge Adcock's court corroborated the judge's testimony as to the court's routine procedures.

At the conclusion of the government's case-in-chief, Bethurum moved for judgment of acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure. After arguments on the motion, the court reserved ruling on the motion. Bethurum then testified in his own defense, confirming that Judge Adcock had given him the routine admonitions about which the judge had testified. Bethurum also testified that, as an employee of his family's gun dealership, he would not have pleaded guilty to the offense had he known that the conviction would affect his ability to possess firearms.

On cross-examination, the government elicited testimony that Bethurum, as an employee of a licensed firearm dealer, was familiar with Form 4473 of the Bureau of Alcohol, Tobacco and Firearms. Form 4473 is a standard form used by firearms dealers to record firearms transactions; after § 922(g) was enacted in 1996, Form 4473 was revised to include a specific question about whether the recipient of the firearm had ever been convicted of a misdemeanor crime of domestic violence. While Bethurum admitted being familiar with the form, he testified that he never had considered whether the form would apply to him.

At the close of all evidence, Bethurum renewed his Rule 29(a) motion. At that time, the judge denied the motion without specific reference to the reserved Rule 29(a) motion that Bethurum had made at the close of the government's case-in-chief. After closing arguments, the court charged the jury that the government was required to prove beyond a reasonable doubt that Bethurum had knowingly and intelligently waived his rights to counsel and trial by jury at the time he pleaded guilty to the prior misdemeanor assault charge.

The jury returned a verdict of guilty on all eight counts of violating § 922(g)(9). After the verdict, Bethurum moved for a judgment of acquittal pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure. Bethurum's Rule 29(c) motion requested that the district court: (1) revive the possibly pending Rule 29(a) motion made at the close of the government's case-in-chief; (2) revive the Rule 29(a) motion made at the close of all evidence; and (3) grant a judgment of acquittal pursuant to Rule 29(c). The district court granted Bethurum's motion, set aside the jury verdict, and entered a judgment of acquittal. *United States v. Bethurum*, 213 F. Supp. 2d 679, 691 (N.D. Tex. 2002). The court held that the initial Rule 29(a) motion was still pending and ruled on it in accordance with the standards set out in Rule 29(b). *See* FED. R. CRIM. P. 29(b) (stating that, when the court reserves ruling on a Rule 29(a) motion but later chooses to rule on the motion, the court must decide the motion "on the basis of the evidence at the time the ruling was reserved"). Considering only the evidence presented during the government's case-in-chief, the court held that Bethurum could not reasonably have been found to make a knowing and intelligent waiver of his rights without direct proof that Bethurum actually knew that a specific consequence of his waivers would be the deprivation of his future right to possess a firearm. *Bethurum*, 213 F. Supp. 2d at 688.

The government now appeals the district court's order granting Bethurum's motion for judgment of acquittal. This court reviews a trial court's order granting a motion for judgment of acquittal *de novo*, applying the same standard as the district court. *United States v. Sanchez*, 961 F.2d 1169, 1179 (5th Cir. 1992).

II. THE ELEMENTS OF A VIOLATION OF § 922(g)(9)

By its text, § 922(g)(9) states three required elements: (1) the accused possessed, shipped, or transported a firearm (2) that had traveled in or affected interstate commerce (3) after the accused had been convicted of a misdemeanor crime of domestic violence. 18 U.S.C. § 922(g)(9); *cf. United States v. Daugherty*, 264 F.3d 513, 515 (5th Cir. 2001) ("Section 922(g)(1) has three requirements: (1) that the defendant previously have been convicted of a felony; (2) that he possessed a firearm; and (3) that the firearm traveled in or affected interstate commerce.") (internal quotations and citations omitted). Prior to trial, the district court ruled that the government had to prove to the jury as an additional element of a § 922(g)(9) violation that Bethurum also knowingly and intelligently waived his rights to counsel and a jury trial when he pleaded guilty to his prior domestic violence misdemeanor. The government argues that this finding was incorrect; instead, the district court should have found that the question of Bethurum's waivers was a question of law that the district court should have decided, not the jury. We agree with the government's argument.

While this court has never considered whether the waiver requirements set forth in § 921(a)(33)(B)(i) are essential elements of a violation of § 922(g)(9), those courts which have considered the question have unanimously concluded that the requirements of § 921(a)(33)(B)(i) are part of the legal definition of a "misdemeanor crime of domestic violence" to be decided by the court as a matter of law rather than a separate and essential element of a violation of § 922(g)(9) which must be proved to the jury beyond a reasonable doubt. *See United States v. Akins*, 276 F.3d 1141, 1146 (9th Cir. 2002) ("Because § 921(a)(33)(B)(i)(I) is a legal definition, its application presents a question of law to be

decided by the trial judge."); *United States v. Hartsock*, 253 F. Supp. 2d 24, 34-35 (D. Me. 2003) (rejecting the reasoning employed by the district court in *Bethurum* and holding that "while the question of whether those rights [to counsel and a jury trial] have been intelligently and knowingly waived may be more fact intensive, the ultimate resolution of the issue still involves a question of law that must be determined by the judge"); *United States v. Pfeiffer*, 206 F. Supp. 2d 1002, 1007-08 (D.S.D. 2002) (ruling as a matter of law on the § 921(a)(33)(B)(i) waiver question); *United States v. Thomson*, 134 F. Supp. 2d 1227, 1231 (D. Utah 2001) ("Because of the intensive factual and legal examination required to determine whether Defendant knowingly and intelligently waived his right to counsel when he plead guilty to battery . . . the court should conduct such a determination prior to trial."); *see also United States v. Smith*, 171 F.3d 617, 621-22 (8th Cir. 1999) (treating the requirements of § 921(a)(33)(B)(i) as part of the legal definition of a "misdemeanor crime of domestic violence" without further elaboration and concluding, as a matter of law, that a particular conviction and waiver of rights satisfied the requirements of § 921(a)(33)(B)(i)).[1]

We agree with these courts. The essential elements of a violation of § 922(g)(9) are set forth in § 922(g)(9) itself; § 921(a)(33) simply provides a legal definition of the term "misdemeanor crime of domestic violence" used in § 922(g)(9). We look first to the fact that § 921 is entitled

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[1] Akins is particularly illuminating in that the court's opinion replaces and supercedes an earlier opinion in the same case, which had held that the knowing and intelligent waiver required by § 921(a)(33)(B)(i) was an element of the § 922(g)(9) offense. *United States v. Akins*, 243 F.3d 1199, 1202 (9th Cir. 2001), *amended and superceded on denial of reh'g by* 276 F.3d 1141 (9th Cir. 2002).

"Definitions." 18 U.S.C. § 921. Second, § 921(a)(33) states, "the term 'misdemeanor crime of domestic violence' means an offense that . . . ." 18 U.S.C. § 921(a)(33)(A) (emphasis added).

Furthermore, in other cases involving weapons-related offenses under § 922(g), the Supreme Court, this court, and numerous other federal courts have treated questions regarding the requirements of § 921(a) as purely legal questions about what constitutes a prior "conviction" under § 922(g). *See Beecham v. United States*, 511 U.S. 368, 370-71, 128 L. Ed. 2d 383, 114 S. Ct. 1669 (1994) (choice-of-law clause in § 921(a)(20) defines the legal rule for determining what constitutes a conviction under § 922(g)); *Daugherty*, 264 F.3d at 514 ("The question whether a felony conviction may serve as a predicate offense for a prosecution for being a felon in possession of a firearm pursuant to § 922(g)(1) is purely a legal one.") (citations omitted); *United States v. Bartelho*, 71 F.3d 436, 439-40 (1st Cir. 1995) (expressly holding that § 921(a)(20) sets forth a purely legal definition of what constitutes a conviction for a predicate offense under § 922(g) and not essential elements of a § 922(g) offense); *United States v. Jackson*, 57 F.3d 1012, 1016-17 (11th Cir. 1995)(same); *United States v. Flower*, 29 F.3d 530, 534 (10th Cir. 1994)(same); *United States v. Clark*, 993 F.2d 402, 406 (4th Cir. 1993)(same).

Because § 921(a)(33) sets forth a legal definition, the trial judge rather than the jury should determine whether a particular conviction is admissible as relevant evidence of a misdemeanor crime of domestic violence. *See* FED. R. EVID. 104; *see also Hartsock*, 253 F. Supp. 2d at 35; *Thompson*, 134 F. Supp. 2d at 1230-31. This is true even though the trial judge's ultimate decision to admit or not to admit a prior conviction may require a factual showing.

We conclude that the district court erred in ruling that the burden fell on the government to prove to the jury, beyond a reasonable doubt, that Bethurum had knowingly and intelligently waived his rights at the time of his prior domestic violence conviction. The question of the effectiveness of the waivers should have been determined as a matter of law by the trial judge pursuant to Rule 104.

The record is fully developed on this point, and we can decide the question as a matter of law on the evidence before us in the record. We find that Bethurum knowingly and intelligently waived his rights to counsel and trial by jury at the time of his misdemeanor domestic violence conviction. Judge Adcock's routine procedures - which include having the defendant sign the detailed waiver form, thoroughly explaining that form to each defendant, and specifically warning the defendant about the advantages of being represented by counsel - adequately ensure that a defendant's waiver of his rights is both knowing and intelligent. *See United States v. Davis*, 269 F.3d 514, 518-19 (5th Cir. 2001) (stating that, while there is "no sacrosanct litany for warning defendants against waiving" their rights, the presiding judge must make the defendant aware of the "dangers and disadvantages of self-representation so that the record will establish that 'he knows what he is doing and his choice is made with his eyes open'") (quoting *Faretta v. California*, 422 U.S. 806, 835, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975)).

Bethurum testified that Judge Adcock apparently followed these routine procedures in his case but that Bethurum chose to proceed *pro se* because he believed he would be able to avoid further legal problems while on probation. While he may now regret that decision, Bethurum has not demonstrated

that, at the time he pleaded guilty, his waiver of his rights was not knowing and intelligent.

Bethurum also argues that his waivers could not have been knowing and intelligent because he was not specifically warned about the effect that a guilty plea would have on his ability to possess a firearm. While the district court found this argument persuasive, we do not.

We have previously stated that a defendant can effectively waive his rights even if not informed of "all the consequences that may flow from conviction or from the imposition of sentence." *United States v. Edwards*, 911 F.2d 1031, 1035 (5th Cir. 1990). For example, we have held that a defendant's waivers can be knowing and voluntary even when the defendant was not warned that her conviction could be used as a sentence enhancement in a subsequent trial, *id.* at 1035; that his driver's license could be forfeited, *Moore v. Hinton*, 513 F.2d 781, 782 (5th Cir. 1975); that he was ineligible for parole, *Trujillo v. United States*, 377 F.2d 266, 269 (5th Cir. 1967); or that his guilty plea would result in a loss of voting rights and right to travel abroad, *Meaton v. United States*, 328 F.2d 379 (5th Cir. 1964). The Seventh Circuit, among others, has held that a guilty plea is knowing and voluntary even where the defendant was not advised that he could be deported as a result of pleading guilty. *Santos v. Kolb*, 880 F.2d 941, 943-44 (7th Cir. 1989).

In fact, we have held that "if a sentencing court informs a defendant of the requirements of rule 11 [of the Federal Rules of Criminal Procedure], he need be informed of no others. All other matters are collateral consequences . . . ." *Edwards*, 911 F.2d at 1035 (internal quotations and citations omitted). This principle applies to warnings given by state

courts as well: "Having complied with rule 11, the state court necessarily complied with the Constitution." *Id.*

As Rule 11 does not require a defendant to be warned of the effect his plea could have on his ability to possess a firearm, *see* FED. R. CRIM. P. 11, we hold that the ability to possess a firearm is a collateral matter. Thus, Bethurum's waivers were not rendered unknowing or involuntary by the absence of a warning on this matter. Our holding is in agreement with numerous state cases. *See, e.g., Polk v. State,* 405 So. 2d 758, 762 (Fla. Dist. Ct. App. 1981); *Saadiq v. State*, 387 N.W.2d 315, 325 (Iowa 1986); *State v. Rodriguez,* 590 N.W.2d 823, 825 (Minn. Ct. App. 1999); *State v. Liefert*, 2002 MT 48, 43 P.3d 329, 309 Mont. 19 (Mont. 2002); *Matter of Ness,* 70 Wn. App. 817, 855 P.2d 1191, 1195 (Wash. Ct. App. 1993).

We conclude that the district court erred in submitting the issue of the validity of Bethurum's waivers to the jury. Further, as a matter of law we find that Bethurum knowingly and intelligently waived his rights to counsel and a jury trial at the time he pleaded guilty to a misdemeanor crime of domestic violence. We therefore vacate the district court's entry of judgment of acquittal and remand for reinstatement of the jury verdict.

IV. CONCLUSION

We VACATE the district court's order granting Bethurum's motion for judgment of acquittal and REMAND for reinstatement of the jury verdict finding Bethurum guilty on all counts alleged in the indictment and for further proceedings.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

NO. 4:02-CR-061-A

[Filed July 31, 2002]

UNITED STATES OF AMERICA	)
VS.	)
BRETT ALDEN BETHURUM	)

JUDGES: JOHN McBRYDE, United States District Judge.

MEMORANDUM OPINION and ORDER

Before the court for decision is the motion of defendant, BRETT ALDEN BETHURUM, for judgment of acquittal. After having considered the motion, the government's response, the record, and pertinent legal authorities, the court has concluded that the motion should be granted to the extent that it reurges the motion for judgment of acquittal that defendant made when the government rested.

I.

Background

The eight-count indictment in this case charges defendant with eight violations of 18 U.S.C. §§ 922(g)(9) and 924(a)(2). Title 18 U.S.C. § 922(g)(9) provides that:

> (g) It shall be unlawful for any person--
>
> . . . .
>
> (9) who has been convicted in any court of a misdemeanor crime of domestic violence,
>
> to . . . possess in or affecting commerce, any firearm
> . . . .

The term "misdemeanor crime of domestic violence," as used in § 922(g)(9), is defined in 18 U.S.C. § 921(a)(33) as follows:

> (33)(A) . . . The term "misdemeanor crime of domestic violence" means an offense that–
>
> (i) is a misdemeanor under Federal or State law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent,

or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

(B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless–

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(emphasis added). Part (ii) of subparagraph (B) of paragraph (33) creates an exception to the definition, which is not applicable here, that reads:

(ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly

provides that the person may not ship, transport, possess, or receive firearms.

(emphasis added).

Title 18 U.S.C. § 924(a)(2) provides, inter alia, that "whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both."

The indictment charges as to each of the eight counts that on a specified date defendant committed the offense by knowingly and unlawfully possessing a specifically described firearm in and affecting interstate commerce when he was "a person who [had] been convicted in a court of the State of Texas of misdemeanor crime of domestic violence." The defendant pleaded not guilty to each count of the indictment.

The trial commenced the morning of June 17, 2002. The evidence presented by the government as its case in chief consisted of:

A. The following exhibits:

1. A charge filed by the district attorney of Tarrant County, Texas, against defendant on April 12, 1997, charging that "on or about the 11th day of April 1997 [defendant] did intentionally or knowingly cause bodily injury to Rebecca Bethurum, a family member of the defendant, by kicking her with his foot." Gov't Ex. 1.

2. A deferred adjudication order showing that on June 9, 1997, in County Criminal Court Number Six, Tarrant County, Texas, defendant entered a plea of

guilty before the Honorable R. J. Adcock, Judge Presiding, to the offense charged against him, that the court found that the evidence substantiated the defendant's guilt, and that "the best interest of society and of the Defendant would be served by deferring proceedings without entering an adjudication of guilt and placing the Defendant on Community Supervision." Gov't Ex. 2.

3. The docket sheet in the state court case against defendant, showing that on June 9, 1997, he pleaded guilty and was "Placed On 24 Months Deferred Adjudication." Gov't Ex. 3.

4. A document defendant signed June 9, 1997, bearing the title "Waiver of Appointment of Attorney and Waiver of Jury Trial by Defendant Entering Plea of Guilty," the text of which immediately above defendant's signature is as follows:

> Now comes the undersigned Defendant in this cause and represents to the Court that I have no attorney, that I do not intend to employ counsel herein, and that I waive any right I may have to have the Court appoint an attorney to defend me in this cause.
>
> I acknowledge that I have been advised by the Court of my right to representation by counsel in the trial of the charge pending against me. I have been further advised that if I am unalbe [sic] to afford counsel, one will be appointed for me free of charge. Understanding my right to have counsel appointed for free of charge if I am not financially able to employ counsel, I wish to waive theat [sic]

rightr [sic] and request the Court to proceed with my case without an attorney being appointed for me. I hereby waive my right to counsel.

I further represent to the Court that I desire to make immediate disposition of this case by here and now entering my plea of guilty, waiving trial by jury and submitting it to the Court on all issues of law and fact.

WHEREFORE, premises considered, Defendant prays the Court to proceed immediately to arraign me in this cause, accept my plea of guilty and waiver of jury trial, to enter judgment thereon and, having entered the same, to immediately sentence me in the manner provided by law, waiving for said purpose every provision of the law the effect of which would delay of [sic] arrest entry of judgment or imposition of sentence.

Gov't Ex. 4. The document shows that it was approved by Judge Adcock on the date it was signed.

5. A document titled "Waiver of Jury Trial and Waiver of Ten Days to Prepare for Trial," which shows that it was signed by defendant on June 9, 1997, the text of which reads as follows:

COMES NOW THE DEFENDANT BRETT ALDEN BETHURUM JOINED BY HIS ATTORNEY IN THE ABOVE STYLED AND NUMBERED CAUSE AND WAIVES THE TEN (10) DAYS ALLOWED HIM TO PREPARE FOR TRIAL AND HERE AND NOW ENTERS HIS ANNOUNCEMENT OF READY. SAID

> DEFENDANT, HIS ATTORNEY AND THE STATE'S ATTORNEY ALSO IN OPEN COURT WAIVES THE RIGHT TO A TRIAL BY JURY. DEFENDANT WAIVES PRESENTENCE REPORT.

Gov't Ex. 5. While this document says that defendant is "joined by his attorney," it and the other exhibits make clear that defendant was not represented by an attorney, but represented himself in the state court proceeding.

> B. A stipulation reached between defendant and the government as to certain elements of the offenses charged against defendant, which was read to the jury. The parties agreed and stipulated to the following facts:
>
> a. That on or about the dates set forth in counts one through eight of the indictment the defendant [sic], prior to time of the offenses as alleged in the indictment, the defendant, BRETT ALDEN BETHURUM, knowingly possessed the firearms alleged in counts one through eight respectively;
>
> b. That prior to time of the offenses as alleged in counts one through eight of the indictment, the firearms listed in counts one through eight of the indictment, [sic] had traveled at some time from one state to another thereby affecting interstate commerce;
>
> c. That the defendant, BRETT ALDEN BETHURUM, is the same BRETT ALDEN BETHURUM who is named in Government's Exhibits 1 through 5; and

d. That on February 12, 1999, defendant, BRETT ALDEN BETHURUM, was adjudicated guilty of the offense as stated in Government's Exhibits one through five.

Stipulation filed 6/17/2002.

C. Judge Adcock's testimony. He did not recall defendant's state court case. He explained the exhibits, and described the procedures he normally follows when a defendant who does not have an attorney appears before him with the intent to plead guilty. He was not aware at the time of defendant's state court appearance of the existence of the offense with which defendant is charged in the instant case. Judge Adcock described a part of the steps he customarily took in explaining to a defendant the risk involved in proceeding without the benefit of an attorney as follows:

> At that time I would give them illustrations that it could hurt them in the future. I would point out that if you were convicted of shoplifting, that's a misdemeanor involving moral turpitude and you could lose your right to vote, that a DWI would raise your insurance rates considerably. I don't believe I ever pointed out this particular offense, because at that time I didn't know it.

Tr. at 96. Judge Adcock then responded to a question posed by the court:

> THE COURT: If you had known in this particular case, for example, the defendant operating a gun shop would not be able to conduct

his business if he pleaded guilty to this domestic offense, would you have warned him of that fact?

THE WITNESS: I doubt it.

Id. at 97.

D. The testimony of a former assistant district attorney of Tarrant County, Texas, Reed O'Connor, concerning the practices that were followed when he was in the district attorney's office in dealing with an unrepresented defendant who wished to plead guilty.

* * * *

When the government rested, defendant, through counsel, made the following oral motion for a judgment of acquittal:

MR. BROWN: Thank you, Your Honor. We'd make a motion at this point for a judgment of acquittal under Rule 29. I'd urge the Court that the evidence is simply insufficient on the element of whether or not Mr. Bethurum is a prohibited person in that he did not knowingly and intelligently waive his right to jury trial or his right to be represented.

We don't have a transcript of the proceeding. Judge Adcock does not have a specific recollection of his exchange with Mr. Bethurum. The one thing he does recall is that he didn't know anything about this federal law, so therefore he surely didn't advise with regard to the possibility of Mr. Bethurum losing his right to operate his

family business and his right to possess arms.

> The jury could make no other decision but that Mr. Bethurum is not guilty and for that reason we move under Rule 29.

Id. at 117. After hearing and considering argument of counsel, the court deferred ruling on the motion, saying: "Well, I'm going to let it go forward. I have some question as to whether I should. And we can look at it again later." *Id.* at 121.

Thereafter, defense counsel put defendant on the stand as a witness. Defendant then rested. The government then called as a rebuttal witness Celia Tijernia, a field inspector for the Bureau of Alcohol, Tobacco and Firearms. The court is not providing the details of the testimony given by defendant and Ms. Tijernia because their testimony is not relevant to the ruling the court is making in this order. Suffice to say here that evidence was received after the government rested (that defendant had worked in a family-owned gun business for about twenty-five years and that his business periodically received publications from the government pertinent to laws governing persons entitled to possess firearms) from which, one might contend, the jury could infer that defendant knew he was at risk of losing his right to possess a firearm when in June 1997 he waived his right to counsel in the state court case and, by entering a plea of guilty, his right to have that case tried by a jury.

After the evidence was closed, defendant, through counsel, made another Rule 29(a) motion for judgment of acquittal "for the reasons stated earlier." *Id.* at 151. After hearing from counsel for the government, the court denied the motion. *Id.* at 151-52. Thereafter, counsel made closing

arguments, the jury was given instructions by the court, and, following deliberation, on June 17, 2002, the jury returned a verdict of guilty as to each count of the indictment.

II.

Defendant's Post-Verdict Rule 29 Motion, and the Government's Response Thereto

In response to a timely filed motion for extension, the court granted defendant an extension to June 28, 2002, for the filing of his motion for judgment of acquittal. The motion was filed June 27, 2002. It has alternative requests. First, defendant requests the court to decide now in his favor the Rule 29(a) motion he made at the conclusion of the government's case in chief. Mot. at 12. In the alternative, defendant urges the court to grant the Rule 29(a) motion he made at the conclusion of the evidence. *Id.* And, finally, he moves the court to set aside the jury's verdict and enter a judgment of acquittal. *Id.*

As to the first of the alternatives, defendant argues that when the government rested, at which time defendant made his first Rule 29(a) motion, there was no evidence that defendant had worked in his family's gun business, i.e., there was no evidence from which the jury could infer that defendant had knowledge that a disposition adverse to him of the state court domestic violence case would have the effect of depriving him in the future of his right to possess a firearm. Defendant acknowledges that in his counsel's opening statement his counsel had made reference to defendant's employment in his family gun shop; but, defendant argues, "the jury would necessarily be required to consider only evidence properly admitted, and not comments

made by counsel for the parties in opening . . . statements." Mot. at 10-11.

Defendant maintains that, therefore, when the government rested there was no evidence that defendant "knowingly and intelligently waived the right to counsel in the [state court] case," 18 U.S.C. § 921(a)(33)(B)(i)(I), or that he "knowingly and intelligently waived the right to have the case tried by a jury, by a guilty plea or otherwise," 18 U.S.C. § 921(a)(33)(B)(i)(II)(bb). The court is not describing the arguments made by defendant in support of the other alternatives because they are not relevant to the ruling of the court.

The government's response to the motion proceeds on the incorrect assumption that the court denied the Rule 29(a) motion defendant made when the government rested. Resp. at 3. As a result, the government does not focus on the status of the record at that time. However, coincidentally bearing on the merit of the first Rule 29 (a) motion are the government's arguments that the waiver of counsel and right to jury trial issues are legal issues to be resolved by the court, and that they must be resolved against defendant. Also, the government maintains that its trial exhibits and the testimony of Judge Adcock and Mr. O'Connor would support a finding beyond a reasonable doubt that defendant intelligently and knowingly waived his right to counsel. The government does not direct its attention to defendant's argument that there was no evidence when he first moved under Rule 29(a) that he knowingly and intelligently waived the right to have the state court case tried by a jury.

III.

Rule 29(a) and Case Law On the Controlling Standard

Federal Rule of Criminal Procedure 29(a) provides that "the court on motion of a defendant . . . shall order the entry of judgment of acquittal of one or more offenses charged in the indictment . . . after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." The (b) part of the rule provides:

> (b) RESERVATION OF DECISION ON MOTION. The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(emphasis added).

Thus, if the court reserves ruling on a Rule 29(a) motion made by a defendant when the government rests, the defendant does not run the risk that a motion that was meritorious at that time will later be subject to denial because as part of the defendant's case he adduced evidence in support of the government's case. *See* FED. R. CRIM. P. 29, advisory committee's notes, 1994 amendments.

The rule of the Fifth Circuit is that in reviewing the sufficiency of the evidence the court must determine whether a reasonable trier of fact could have found that the evidence

established the essential elements of the crime beyond a reasonable doubt. *United States v. Perrien*, 274 F.3d 936, 939 (5th Cir. 2001). If the evidence did not meet that standard of sufficiency when the government rested, the Rule 29(a) motion defendant made at that time was meritorious, and should now be granted.

IV.

Analysis

At the outset, the court must resolve the question of whether the "knowingly and intelligently" waiver issues are factors the government had to prove to the satisfaction of the jury beyond a reasonable doubt to obtain a conviction or, as the government contends, the defendant had the burden of proof, and those issues are legal ones to be decided by the court. The court has concluded that the waiver issues are factors the government was obligated to establish, and that for the defendant to be convicted there would have to be sufficient evidence for a reasonable jury to find the existence of those factors beyond a reasonable doubt. And, the court has concluded that there was no such evidence when defendant made his first Rule 29(a) motion.

The government argues, relying on authorities such as *McKelvey v. United States*, 260 U.S. 353, 357, 67 L. Ed. 301, 43 S. Ct. 132 (1922), that the knowing and intelligent waiver factors are exceptions to the § 922(g)(9) offense, and that the defendant had the burden to establish that his conduct came within one of the exceptions. That argument ignores the fact that the separate proviso in this case, § 921(a)(33), is not a mere exception but is an affirmative statement of important elements that constitute the § 922(g)(9) offense. Congress was careful in § 921(a)(33) to define the term of art,

"misdemeanor crime of domestic violence," it had used in § 922(g)(9). In doing so, Congress made clear that a conviction of a misdemeanor crime of domestic violence would not exist unless the accused was represented in the misdemeanor action by counsel or "knowingly and intelligently waived the right to counsel in the case" and, if the accused was entitled to a jury trial in the misdemeanor action,[1] his or her case was either tried to a jury or he or she "knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise."[2]

The use of the word "if" in § 921(a)(33)(B)(ii) might well, and probably does, introduce an exception as to which the defendant would have the burden of proof. In contrast, § 921(a)(33)(B)(i) is a basic part of the definition of the term "misdemeanor crime of domestic violence," and does not merely create an exception that would enable a person otherwise subject to the statute to escape the statute's consequences upon proof of the exception. Section 921(a)(33)(B)(i) is a part of the offense-defining portion of the

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[1] Apparently the parties are in agreement that defendant was entitled to a jury in his misdemeanor state court action.

[2] If, as the government maintains, the use of the word "unless" in 921(a)(33)(B)(i) creates exceptions on which a defendant has the burden of proof in order to avoid conviction, one could just as reasonably contend that, to avoid a conviction of treason, the accused, if he or she did not confess in open court, would have the burden to prove that testimony could not be provided by two witnesses to the overt act of treason of which he or she was accused. *See* U.S. CONST. art. III, § 3 ("No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on the Confession in open Court." (emphasis added)).

offense statute--it provides a description of factors that must be found to exist before an accused can be subjected to the offense in the first instance. Therefore, the government had the obligation to adduce evidence as part of its case in chief that would have allowed a reasonable jury to find that the existence of those factors beyond a reasonable doubt. *See United States v. Gaudin*, 515 U.S. 506, 510-13, 522-23, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995). *See also United States v. Perrien*, 274 F.3d at 939 n.1.

From the outset, the government has sought to frame the issue in terms of whether defendant's state court misdemeanor conviction was valid. *See* Tr. at 81-82. That is not the issue at all. Indeed, as a general proposition a defendant would not be permitted to challenge the validity of his or her predicate conviction.[3] *See Lewis v. United States*, 445 U.S. 55, 67-68, 63 L. Ed. 2d 198, 100 S. Ct. 915 (1980). Nor is the court confronted with the legal issue of whether the predicate offense qualifies as such under the laws of the State of Texas, which is the issue the Fifth Circuit confronted in *United States v. Daugherty*, 264 F.3d 513, 514 (5th Cir. 2001), cert. denied, 534 U.S. 1150, 151 L. Ed. 2d 1007, 122 S. Ct. 1113 (2002). State law does not enter the picture here. Rather, the question is whether, without regard to the validity, vel non, of the misdemeanor conviction, there was sufficient evidence of the elements of the offense set forth in § 921(a)(33)(B)(i) to withstand a Rule 29(a) motion made when the government rested. Validity of the state court conviction could well become an issue if a defendant were to urge the exception

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[3] To the extent that Congress considered the validity of the state court conviction to bear on guilt of the offense in question, it included the exception on that subject that is found in § 921(a)(33)(B)(ii).

contemplated by § 921(a)(33)(B)(ii). In contrast, a person can have a perfectly valid misdemeanor conviction but not be guilty of the offense in question because of the government's failure to prove beyond a reasonable doubt that the defendant waived counsel and trial by jury by the standards Congress fixed by § 921(a)(33)(B)(i).

The government seeks comfort in the amended opinion of the Ninth Circuit in *United States v. Akins* in which the court made the following puzzling statements in a case involving a conviction under § 922(g)(9):

> Under the terms of the statute, then, an indictment under § 922(g)(9) cannot stand if the defendant was not represented by counsel and did not knowingly and intelligently waive the right to counsel in the predicate misdemeanor. *Cf. United States v. Swanson*, 947 F.2d 914, 919 (11th Cir. 1991) (dismissing an indictment based on the court's finding that restoration of the defendant's civil rights placed him within 18 U.S.C. § 921(a)(20)'s expungement exception). Because § 921(a)(33)(B)(i)(I) is a legal definition, its application presents a question of law to be decided by the trial judge. *See United States v. Bartelho*, 71 F.3d 436, 440 (1st Cir. 1995) (holding that the applicability of § 921(a)(20)'s expungement exception is a question of law to be decided by the judge); *United States v. Flower*, 29 F.3d 530, 535 (10th Cir. 1994) (same).

276 F.3d 1141, 1146 (9th Cir. 2002). The Ninth Circuit mixes apples with oranges (an expungement exception with a legal definition of the offense) to reach its amazing conclusion that "because § 921(a)(33)(B)(i)(I) is a legal definition, its application presents a question of law to be decided by the

trial judge." *Id.*[4] The Ninth Circuit had it right the first time when it said in its original opinion that:

> By defining the federal offense to require a knowing and intelligent waiver of the right to counsel in the underlying domestic violence conviction, Congress made knowing and intelligent waiver an element of the § 922(g)(9) offense. The government thus has the burden of proving beyond a reasonable doubt a knowing and intelligent waiver of the right to counsel in the predicate offense. *See In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368, 51 Ohio Op. 2d 323 (1970) ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

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[4] The court notes with interest that after relying on *United States v. Bartelho*, 71 F.3d 436, 440 (1st Cir. 1995), as support for the proposition that § 921(a)(33)(B)(i)(I) is a legal definition presenting a question of law to be decided by the trial judge, the court went on to reverse the trial court's conclusion that the defendant knowingly and intelligently waived his right to counsel in his early assault conviction because "the record in this case does not establish that Akins chose to waive the right to counsel with 'eyes open' . . . ." *United States v. Akins*, 276 F.3d 1141, 1149 (9th Cir. 2002). If the Ninth Circuit had been true to *Bartelho*, it would have concluded, as did the *Bartelho* court, that the defendant had the burden of proof. A problem the Ninth Circuit encountered was understanding that § 921(a)(33)(B)(i)(I) presents fact issues that necessarily would have to be resolved by a jury in a criminal case, whereas, on the other hand, the expungement issue normally would not present a question of fact and normally would be a legal question to be decided by the judge.

United States v. Akins, 243 F.3d 1199, 1202 (9th Cir. 2001), *amended and superseded on denial of reh'g by United States v. Akins*, 276 F.3d 1141 (9th Cir. 2002). Also, the Ninth Circuit was correct when it said that when evaluating whether a waiver is valid a court should adopt every reasonable presumption against waiver. 243 F.3d at 1203.

This court disagrees with the government's contention that defendant could knowingly and intelligently waive his right to counsel and his right to have his state court case tried by a jury (by entering a plea of guilty), within the contemplation of § 921(a)(33)(B)(i), without knowing that a consequence of his waivers could be the deprivation of his right in the future to possess a firearm. The Fifth Circuit has held that the Second Amendment "protects the rights of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms . . . ." *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001), cert. denied, 153 L. Ed. 2d 184, 122 S. Ct. 2362 (2002). When Congress made the knowing and intelligent waiver factors a part of the definition of misdemeanor crime of domestic violence, it undoubtedly had in mind that one of the things that would have to be known to the accused for the waiver factors to exist would be that thereafter his or her possession of a firearm would subject him or her to a felony offense if a misdemeanor conviction were to follow from the waivers. Congress presumably recognized that the offense it created by § 922(g)(9) was a particularly onerous one for a person convicted of a misdemeanor in connection with a domestic altercation. It is common knowledge that accusations of domestic abuse often are lightly made, with skimpy or no substantive basis, during the give and take of divorce litigation and other forms of spousal, or domestic partner,

disputes, such as child custody proceedings.[5] And, it is common knowledge that spouses or domestic partners, without giving significant consideration to the consequences of doing so, often cave in with a plea of guilty to those sorts of domestic relations accusations rather than to devote the time and resources to a defense of the charges.

Apropos here is language the Fifth Circuit used in *Molignaro v. Smith*:

> It may be argued that the mere under-estimate of possible penalties attaching to a crime will not induce innocent men to waive counsel or confess guilt, and that any mistakes in this respect are therefore nonprejudicial. The decisional development of the anti-sporting concept of justice, however, reflects the fear that innocent men pitted against trained prosecutorial forces may waive counsel and plead guilty to crimes they have not committed, if they think that by doing so they will avoid the publicity of trial, secure a break at the sentencing stage, or simply get the whole thing over with. Defendants who know the stiff penalties involved will be less likely to submit in this fashion.

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[5] The level of seriousness with which accusations of domestic violence are taken in the divorce litigation community is reflected by the fact that often the somewhat standard forms used for the bringing of a divorce action include allegations of domestic violence, or threatened domestic violence, as grounds for divorce, along with the request for injunctive relief to prevent the nonfiling spouse from committing acts of violence against the filing spouse. And, those kinds of injunctions routinely are given by domestic relations courts based on the bare allegations of the filing spouse.

408 F.2d 795, 801 (5th Cir. 1969). Congress must have had in mind the anti-sporting concept of justice when it put the waiver proof requirements in the definition. Undoubtedly, Congress was particularly concerned that an accused, with legitimate reason to question guilt, in a so-called domestic violence case would later unfairly be subjected to a federal felony offense because of possessing a firearm even though the accused had no knowledge of that risk when he or she earlier waived the right to counsel and trial by jury by pleading guilty to the domestic abuse offense.

The instruction the court gave the jury in the instant action on the knowing and intelligent waiver factors was as follows:

> [THE COURT:] You are instructed that before you can find the defendant had been convicted in a court of a misdemeanor crime of violence, as required by the second element already mentioned, you must be convinced that the government has proved, in addition to the facts previously mentioned, each of the following things beyond a reasonable doubt: (a) that when the defendant pleaded guilty in the state court case in question, he knowingly and intelligently waived the right to counsel in such case before he pleaded guilty; and (b) that the defendant knowingly and intelligently waived the right to have such case tried to a jury, by a guilty plea, or otherwise.
>
> Okay. Now, I'm going to define for you what the words "knowingly" and "intelligently" mean in the sense they're used in these instructions.
>
> The words "knowingly and intelligently," as they have just been used, mean that the defendant knew and understood, before he waived his right to counsel

and his right to have his case tried to a jury, all material consequences of his waivers and that he made an intelligent decision to forego his right to counsel and to a jury trial with full knowledge of those consequences.

In other words, as part of its burden in this case, the government must also prove beyond a reasonable doubt that when the defendant waived his right to counsel and his right to have his case tried to a jury he knew of the consequences of those waivers and made the intelligent decision to make the waivers with full knowledge of those consequences. If the government fails to make that proof, you must find the defendant not guilty.

Tr. at 174-75 (emphasis added).

The foregoing instruction is the same as the one that would have been given if the defendant had rested along with the government, and the case had been submitted to the jury at that time. A jury guided by such an instruction could not have found defendant guilty if its deliberations were based on the evidence that existed when the government rested because the jury could not have found from that evidence that defendant's waivers occurred when he knew and understood all material consequences of his waivers and that he made an intelligent decision to forego his right to counsel and to a jury trial with full knowledge of those consequences. There was no direct evidence that defendant had knowledge that the state court conviction to which his waivers were calculated to lead, and did lead, could result in defendant's loss of his right to possess a firearm, nor was there evidence from which the jury could infer that defendant had that knowledge.

The concern of the court that caused the court to reserve a ruling on defendant's first Rule 29(a) motion was that, while there was no evidence that defendant was in the firearms business, the jury had been told by defense counsel in his opening statement that they would hear evidence that defendant was an employee and co-owner of a gun business, and that participation in that business had been his only job as an adult. Tr. at 85-86, 120. Moreover, during the voir dire session, the court, when informing the prospective jurors of the nature of the case, included the following in its explanations:

> [THE COURT:] Generally speaking, the defendant was in the business of selling firearms, and I'm giving you some background about what the government is claiming. What I say is not something the jury would take into account in deciding the case, but are things that will help you more intelligently answer the questions. And I'm just stating my understanding.
>
> My understanding is that the defendant is and has been in the business of running a gun shop or working in a gun shop and some time a few years back he had an altercation with – I believe the contention is it was his wife, and that resulted in him pleading guilty to the offense of – a domestic violence offense of some kind, and then later each of these counts of the indictment relates to a transaction he engaged in, in the gun shop business at later dates. And he's being accused of violating a federal statute for having engaged in those transactions after having been convicted of that misdemeanor offense related to his wife.
>
> Now, in a general way I believe that describes the nature of the offense charged, and the defendant has

pleaded not guilty to each of the counts of the indictment and it's up to the government, if it can, to prove beyond a reasonable doubt the defendant's guilt.

Tr. at 15-16. Shortly thereafter, the following exchange occurred during voir dire:

[THE COURT:] Now, what is the name of the gun shop, Mr. Brown, so I can ask the jury about that?

MR. BROWN: It's Arlington Arms, Your Honor.

THE COURT: Arlington Arms?

MR. BROWN: Yes, sir.

THE COURT: And what is your client's relationship to the gun shop? Is he an employee or –

MR. BROWN: Judge, he's a co-owner.

THE COURT: Okay. Is there anyone on the jury panel who has any knowledge of the defendant, and for your information he's the co-owner and has been employed at a gun shop in Arlington, Texas, called Arlington Arms. Do any of you have any knowledge of the defendant? If so, raise your hands.

Id. at 16-17. And, the court posed a question to Judge Adcock that assumed that defendant operated a gun shop. *Supra* at 8. Thus, though there was no evidence when the government rested that defendant operated a gun shop, the case had proceeded to that point on the assumption that he did.

However, upon further consideration, the court has concluded that those mentions by the court and defense counsel of defendant's ownership of, and participation in, a firearms business cannot serve as surrogates for evidence of those facts. The court's instructions to the jury included the following:

> [THE COURT:] As I told you earlier, it is your duty to determine the facts. In doing so, you must consider only the evidence presented during the trial, including the sworn testimony of the witnesses and the exhibits.
>
> Remember that any statements, objections, or arguments made by the lawyers are not evidence. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.
>
> Also, do not assume from anything I may have said or done during the trial that I have any opinion concerning any of the issues in this case. Except for the instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

Tr. at 168. If the case had been submitted to the jury when the government rested, the same instructions would have been given; with the result that the jury, if it followed the instructions, could not, and presumably would not, have

attached any significance to the remarks of the court and defense counsel concerning defendant's involvement in a firearms business.[6]

For the reasons given above, the court has concluded that the decision it reserved on the Rule 29(a) motion defendant made when the government rested must now be rendered in favor of defendant on the basis of the evidence existing at that time. As a result, the court does not need to discuss the alternative requests for relief made by defendant in his motion for judgment of acquittal.

V.

ORDER

Therefore,

The court ORDERS that defendant's motion for judgment of acquittal be, and is hereby, granted; that the jury's verdict of guilty as to each of the eight counts of the indictment filed in this action on April 17, 2002, be, and is hereby, set aside so that each of them is no longer of any force or effect; and, that defendant be, and is hereby, acquitted of the offenses charged against him in the eight-count indictment filed in this case on April 17, 2002.

SIGNED July 31, 2002.

/s/_____
JOHN McBRYDE

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[6] As the Fifth Circuit noted in *United States v. Fletcher, "juries are presumed to follow the instructions of the court."* 121 F.3d 187, 197 (5th Cir. 1997).

United States District Judge

JUDGMENT OF ACQUITTAL

The court having granted the motion of defendant, BRETT ALDEN BETHURUM, for judgment of acquittal,

The court ORDERS, ADJUDGES, and DECREES that defendant be, and is hereby, acquitted of all offenses charged against him by the indictment filed in the above-captioned case on April 17, 2002, and that any bond is exonerated.

SIGNED July 31, 2002.

/s/_____

JOHN McBRYDE

United States District Judge

APPENDIX D

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT 5

Criminal actions--Provisions concerning--Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT 2

Right to bear arms.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT 6

Rights of the accused. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

TITLE 18
CRIMES AND CRIMINAL PROCEDURE
CRIMES CHAPTER 44
FIREARMS

18 USC § 921(a)(33)(A)

Definitions (a) As used in this chapter –

(33)(A) Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that–

(i) is a misdemeanor under Federal or State law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

(B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter unless–

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

TITLE 18
CRIMES AND CRIMINAL PROCEDURE
CRIMES
CHAPTER 44
FIREARMS

§ 922. Unlawful acts

18 USC § 922(g)(9)

(g) It shall be unlawful for any person–

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.